

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Marshall Helmberger,

Complainant,

ORDER OF DISMISSAL

v.

Johnson Controls, Incorporated

Respondent

On July 27, 2011, Marshall Helmberger filed a Complaint with the Office of Administrative Hearings. Mr. Helmberger alleges that Respondent Johnson Controls, Incorporated (Johnson Controls) violated the Minnesota Government Data Practices Act by denying him access to a copy of a certain subcontract between Johnson Controls and Architectural Resources, Incorporated (ARI).

Respondent Johnson Controls filed an initial response to the Complaint on August 18, 2011.

Mark R. Anfinson, Attorney at Law, appeared on behalf of the Complainant, Marshall Helmberger. David L. Lillehaug and Christopher A. Stafford, of Fredrikson & Byron P.A., appeared on behalf of Johnson Controls.

After reviewing the Complaint and Johnson Controls' Response to the Complaint, the Administrative Law Judge has determined that the Complaint does not present sufficient facts to believe that violations of Chapter 13 have occurred. Specifically, the Administrative Law Judge concludes that there is no probable cause to believe that Johnson Controls violated the Minnesota Government Data Practices Act by denying Mr. Helmberger access to the Johnson Controls-ARI subcontract. Accordingly, the Complaint must be dismissed.

Based upon the Complaint, the Respondent's response and the Complainant's reply, and for the reasons set forth in the attached Memorandum,

IT IS HEREBY ORDERED:

1. The Complaint is DISMISSED.
2. Because the costs of the Office of Administrative Hearings in connection with this matter exceed the amount of the filing fee, Mr.

Helmberger is not entitled to a refund of the filing fee under Minn. Stat. § 13.085, subd. 6 (d).

3. Because the Complaint has not been shown to have been frivolous in nature or to have been brought for the purposes of harassment, Johnson Controls is not entitled to recover reasonable attorneys fees under Minn. Stat. § 13.085, subd. 6 (e).

Dated: September 14, 2011

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 13.085, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings no later than five business days after the Complainant receives notice that the Complaint has been dismissed for failure to present sufficient facts to believe that a violation of Chapter 13 has occurred. If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear material error and grants the petition, the Chief Administrative Law Judge will schedule the complaint for a hearing under Minn. Stat. § 13.085, subd. 4.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 13.085, subd. 5(d), and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Factual Background

Independent School District 2142 (School District) entered into a contract with Johnson Controls for project management, construction and architectural services relating to schools in New Independence Township and Field Township, Minnesota.¹

¹ Complaint, Attachment A at 1.

In January of this year, Marshall Helmberger, Publisher and Managing Editor of the Timberjay Newspapers made a request for contract-related documents under the Minnesota Government Data Practices Act (Data Practices Act). Specifically, Mr. Helmberger requested that Johnson Controls produce for his inspection a copy of the subcontract between Johnson Controls and ARI.² The School District does not now possess, nor did it request under its prime contract with Johnson Controls, a copy of this subcontract.³

For its part, Johnson Controls refused to make the requested disclosures, asserting that it does not have a legal duty to furnish these documents to Mr. Helmberger or other members of the public.⁴

Probable Cause Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.⁵ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.⁶ A judge's function in a probable cause determination does not extend to an assessment of the credibility of conflicting testimony; the task is simply to determine whether the facts available establish a reasonable belief that Johnson Controls violated the Data Practices Act.

Analysis

Because the data that Mr. Helmberger seeks is not created, collected or maintained by the School District, the probable cause determination turns upon a key question of law – namely: When Johnson Controls entered into a contract to build facilities for the School District was it undertaking a "government function" as those terms are used in Minn. Stat. § 13.05, subd. 11(a)?

If Johnson Controls was undertaking a "government function" when performing under the construction contract, it stands in the place of the School District for purposes of the Data Practices Act. If it was not performing a "government function" while

² *Id.* at 1-2.

³ *Id.* at 2.

⁴ *Id.*; Johnson Controls' Request for Dismissal, at 5.

⁵ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

⁶ *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. See, *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

completing this work, Johnson Controls is like any other private party, and is not required to make its records available for public inspection.

Minn. Stat. 13.05, subd. 11 provides:

Privatization. (a) If a government entity enters into a contract with a private person to perform any of its functions, the government entity shall include in the contract terms that make it clear that all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this chapter and that the private person must comply with those requirements as if it were a government entity. The remedies in section 13.08 apply to the private person under this subdivision.

(b) This subdivision does not create a duty on the part of the private person to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract.

Mr. Helmberger argues that the application of the Data Practices Act in this context is self-evident. He asserts that all public building projects undertake government functions on behalf of the agencies that purchase completed facilities.

While Mr. Helmberger's position has some allure, the Administrative Law Judge does not agree. In the view of the Administrative Law Judge, Mr. Helmberger conflates contracting that is furtherance of a "public purpose,"⁷ with the much narrower category of transfers of government duties to a non-public entity.

To be sure, construction of school facilities qualifies as a public purpose and justifies the expenditure of School District funds. Yet, not every disbursement of public money includes, or implies, a transfer of governmental duties to a private contractor. In the view of the Administrative Law Judge, the provisions of Minn. Stat. § 13.05, subd. 11, are directed at this much smaller category of contracting. The best reading of the statute is that it is a protection against state or local governments obviating the duties imposed under the Data Practices Act by simply transferring governmental duties and decision-making to a private firm.

The decision of the Minnesota Court of Appeals in *WDSI, Inc. v. County of Steele*, does not point to a different conclusion. As Judge Shumaker explained:

While "governmental function" is not defined in the [Data Practices Act], Minnesota courts, in the context of tort liability, have held that the test

⁷ Minn. Stat. 16C.03, subd. 3 ("The commissioner shall acquire all goods, services, and utilities needed by agencies") (emphasis added), and *State ex rel. Commissioner of Transportation v. Kettleson*, 801 N.W.2d 160, 166 (Minn. 2011) (the improvement of Highway 61 had a public purpose because "without question" it was "a transportation plan with the over-arching purpose of providing a public benefit").

for a governmental function is “whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit.” In addition, “a function is governmental where it involves the exercise of power conferred by statute upon local agencies in administering the affairs of the state and the promotion of the general public welfare.”⁸

In *WDSI*, the contractor was not simply operating for its own account following the award of the contract; but rather it was undertaking a policy role for Steele County: WDSI was deciding which companies were eligible to compete for later public contracts. As the *WDSI* court makes clear, if a contractor is hired to undertake decision-making like that which is associated with operating a state hospital, a boat harbor or a public procurement system, it is “administering the affairs of the state” in the place of government officials. These operations are subject to the Data Practices Act.⁹

The converse also is true. The mere act of selling goods or services to a government agency does not involve such a policy-making role; nor should it presumptively subject all contract-related documents in the contractor's files to public inspection. The opening of all contract-related files does not follow from a natural reading of Minn. Stat. § 13.05, subd. 11(a).

Importantly, in this case, after the construction contract was awarded to Johnson Controls, the duty and authority to construct public schools within District 2142 remained in the hands of District officials – not Johnson Controls.

Likewise significant, it cannot be said that permitting a building contractor to select lower tier vendors on a school construction contract is a mere pretext for avoiding the duty to make government records available to the public. Inappropriate gamesmanship by government officials is neither alleged by Mr. Helmberger nor evident from this record.

In reaching these conclusions, the Administrative Law Judge is mindful that in Advisory Opinion 11-005, the Commissioner of Administration expressed a different view as to the reach Minn. Stat. § 13.05, subd. 11(a). The Commissioner wrote:

Pursuant to Minnesota Statutes section 123B.02, subdivision 2:

It is the duty and function of the District to furnish school facilities to every child of school age residing in any part of the district

⁸ *WDSI, Inc. v. County of Steele*, 672 N.W.2d 617, 620-21 (Minn. App. 2003) (citing *Papenhausen v. Schoen*, 268 N.W.2d 565, 569-70 (Minn.1978), *Heitman v. Lake City*, 30 N.W.2d 18, 21 (Minn. 1947) and *Mace v. Ramsey County*, 42 N.W.2d 567, 569 (Minn. 1950)).

⁹ See, *id.*

Numerous other statutory provisions address school districts' duties and authority regarding the construction and renovation of public schools. Accordingly, JCI is performing a governmental function for the District.¹⁰

While the Data Practices Act does oblige state tribunals to defer to advisory opinions rendered by the Commissioner of Administration,¹¹ these opinions are not binding authority nor do they form "law of the case." Therefore, in the rare circumstance that an Administrative Law Judge might differ with the Commissioner on the proper reading of a statute, the Legislature does permit principled differences. This is one of those rare cases.

In the view of the Administrative Law Judge, a difference of opinion is appropriate because Advisory Opinion 11-005 does not reference legislative history that would indicate that a very broad application of Minn. Stat. § 13.05, subd. 11 was intended by the Legislature, nor does the Commissioner detail the Department of Administration's own role in the development of this statutory provision. Thus, both the Commissioner and the Administrative Law Judge have read the plain words of the statute, with an eye to the manifest purposes of the Legislature, and come to different conclusions as to what the statute requires.¹²

Lastly, while the sought-after subcontractor data is not now held by the School District, this need not be the case. If it would be useful to have this kind of data held by the purchasing agency, or to be publicly accessible, such a result can be provided for in public contracting.¹³

Because the requested subcontractor data is not held by the School District, and the School District has not transferred government functions to Johnson Controls as part of the construction contract, Mr. Helmberger is not entitled to relief under the Data Practices Act. Dismissal of the Complaint is the appropriate result.

E. L. L.

¹⁰ Advisory Opinion 11-005 (emphasis and citations omitted).

¹¹ Minn. Stat. § 13.072, subd. 2.

¹² Compare generally, *Communities United Against Police Brutality, v. City of Minneapolis*, 2010 WESTLAW 2035961, at *3, n. 3 (Minn. App. 2010) (unpublished) ("While we defer to the commissioner in areas within the commissioner's expertise, interpretation of case law is a matter within the courts' expertise"); *Day v. Miner*, 1998 WESTLAW 279229, at *2 (Minn. App. 1998) (unpublished) (as to the interpretation of statutes "the district court was not compelled to follow the commissioner").

¹³ See generally, Minn. Stat. § 16C.16; Minn. Rule 1230.1820 (Required Subcontracting for Construction of Professional or Technical Services).